No brief for resp.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1936

No. 155

EMPLOYERS REINSURANCE CORPORATION,
PETITIONER,

vs.

RANDOLPH BRYANT, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 2, 1936.

CERTIORARI GRANTED OCTOBER 12, 1936.

SUPREME COURT OF THE UNITED STATES

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No.

EMPLOYERS REINSURANCE CORPORATION,
PETITIONER,

vs.

RANDOLPH BRYANT, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF TEXAS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT

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[fol. a]

IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

No. 8040

In re EMPLOYERS REINSURANCE CORPORATION, Praying for a Writ of Mandamus and Writ of Prohibition

PETITION FOR WRITS OF MANDAMUS AND PROHIBITION—Filed February 10, 1936

[fol. 1] To the Honorable Justices of the Circuit Court of Appeals for the Fifth Circuit of the United States:

Now comes Employers Reinsurance Corporation, petitioner herein, appearing specially and only for the purposes of asking leave to file and filing its said petition herein, and says:

I

That your petitioner, Employers Reinsurance Corporation, is a corporation duly incorporated under and by virtue of the laws of the State of Missouri, and is a citizen of the State of Missouri, but is authorized to do business in the State of Texas.

II

That your petitioner shows to the court that heretofore, to-wit, on or about the 3rd day of June, 1935, W. J. Clark, a citizen and resident of the State of Texas, filed suit in cause No. 4259-B, styled W. J. Clark vs. Employers Rein-
[fol. 2] surance Corporation, in the District Court for the 124th Judicial District of the State of Texas against your petitioner herein; that said suit was brought by the plaintiff therein for the purpose of recovering damages against this defendant under the Workmen's Compensation Laws of the State of Taxes on account of personal injuries alleged to have been sustained by the plaintiff in the State of Texas while he was employed by Shell Petroleum Corporation, a Virginia Corporation; that plaintiff in said suit alleged and claimed that by reason of said injuries he had

been and become totally and permanently disabled, and your petitioner says that if plaintiff is successful in sustaining the allegations in his said petition, the plaintiff would be entitled to recover against petitioner considerably more than $3,500.00, and your petitioner, therefore, shows to the court that the matters and amounts in controversy in said suit exceed the sum of $3,000.00 exclusive of interest and costs.

III

Your petitioner further shows to the court that shortly after the filing of said suit citation was issued out of said District Court for the 124th Judicial District of Texas and served upon one John R. Young as an alleged agent of your Petitioner at Houston, Texas, in the Southern District of [fol. 3] Texas; that thereafter, to-wit, on or about the 29th day of June, 1935, your petitioner, before it was called upon to answer in said court and at the time and in the manner required by law, filed its petition and bond for removal of said cause to the District Court of the United States for the Eastern District of Texas, Tyler Division, and that thereupon the Honorable W. C. Hurst, Judge of said District Court for the 124th Judicial District of Texas on the 1st day of July, 1935, duly approved the removal bond filed in said cause by your petitioner and entered an order removing said cause to said District Court of the United States for the Eastern District of Texas, Tyler Division; that pursuant to said order of removal transcript of the proceedings in said cause was duly filed, in the manner and within the time required by law, to-wit, on July 24th, 1935, in the said District Court of the United States for the Eastern District of Texas, Tyler Division, and same was assigned No. 3352 on the Law Docket of said Court; that thereafter, to-wit, on or about the — day of August, 1935, your petitioner filed in said District Court of the United States for the Eastern District of Texas, Tyler Division, a plea to the jurisdiction of said District Court of the United States for the Eastern District of Texas, reciting that your petitioner was not properly before the court having never been served with due and proper service, and moved to [fol. 4] quash citation and the service thereon theretofore issued out of the District Court for the 124th Judicial District of Texas and served upon John R. Young as aforesaid

on the ground that said John R. Young was not at the time of the filing of said suit, or the issuance of said citation, or the service thereof, an agent of your petitioner, Employers Reinsurance Corporation; that thereafter, to-wit, on or about the 7th day of September, 1935, without waiting for the ruling of the Honorable Judge of said District Court of the United States for the Eastern District of Texas upon your petitioner's said plea and motion, the plaintiff caused to be issued out of said court citation directed to one E. C. Gaines, an agent of your petitioner at Austin in the Western District of Texas, and that said citation was served upon said Gaines by the United States Marshal for the Western District of Texas at Austin in said Western District of Texas on or about the 21st day of September, 1935; that thereafter, to-wit, on or about the 2nd day of October, 1935, your petitioner renewed in said District Court of the United States for the Eastern District of Texas, Tyler Division, its plea to the jurisdiction of said court on the ground that it had not been served in said cause by due and proper service; and moved to quash the citation and service thereon issued out of said court on the ground that said suit was a cause not of a local nature and that service of [fol. 5] citation was had and made without the boundaries of the District Court of the United States for the Eastern District of Texas and was, therefore, of no force and effect; that thereafter, on or about the — day of ——, 1935, the Honorable Randolph Bryant, Judge of the said District Court of the United States for the Eastern District of Texas, entered his order quashing the citations above referred to and the service thereon; that thereafter, to-wit, on or about the — day of ——, 1935, the plaintiff, W. J. Clark, filed in said District Court of the United States for the Eastern District of Texas his motion to remand said cause to the District Court for the 124th Judicial District of the State of Texas reciting that the Honorable District Court of the United States for the Eastern District of Texas could not proceed to judgment in said cause for the reason that the service of process out of said court could not be made upon any agent of your petitioner within the boundaries of the said District Court of the United States for the Eastern District of Texas, but admitting that said court had and held jurisdiction over the subject matter of said suit; that thereafter, on or about the 20th day of Jan-

uary, 1936, the Honorable Randolph Bryant, Judge of the District Court of the United States for the Eastern Dis-
[fol. 6] trict of Texas made and entered his order granting the motion of said plaintiff to remand said cause to the District Court for the 124th Judicial District of Texas and directed the Clerk of said court to transmit all of the original papers in said cause to the clerk of said District Court for the 124th Judicial District of Texas, and remanding, said cause to said District Court for the 124th Judicial District of Texas upon payment of the costs incurred in the District Court of the United States for the Eastern District of Texas by the plaintiff, but your petitioner would show to the court and says that said order remanding said cause as aforesaid has not yet been executed or carried into effect and that said District Court of the United States for the Eastern District of Texas has jurisdiction over said cause.

IV

Your petitioner files with its petition and prays to be taken as a part and parcel thereof, a certified copy of the record in this cause in the said District Court of the United States for the Eastern District of Texas, Tyler Division marked Exhibit A.

V

Your petitioner alleges that the Honorable Randolph Bryant, Judge of the District Court of the United States for the Eastern District of Texas, was not authorized to remand said cause to the District Court for the 124th Judicial District of the State of Texas under Section 28 (28 U. S. C. A. par. 71) of the Judicial Code, upon the allega-
[fol. 7] tions of the motion to remand said cause, for the reason that it is nowhere shown or made to appear that said cause was improperly removed to said court, in fact, it being expressly admitted that said cause was properly removed to said court.

VI

Your petitioner alleges that the said Honorable Randolph Bryant, Judge of the District Court of the United States for the Eastern District of Texas, was not authorized to remand said cause to the District Court for the 124th Judi-

cial District of State of Texas under Section 37 (28 U. S. C. A. par. 80) of the Judicial Code, upon the allegations of the motion to remand said cause, for the reason that it affirmatively appears that the Honorable District Court of — United States for the Eastern District of Texas had acquired jurisdiction over said cause, had at the instance and request of the plaintiff in said cause exercised its said jurisdiction by the issuance of its process and by other actions of said court as aforesaid, and that thereby the jurisdiction of the District Court for the 124th Judicial District of the State of Texas has been terminated and extinguished and may not be revived.

VII

Your petitioner alleges that the Honorable Randolph Bryant, Judge of the District Court of the United States for the Eastern District of Texas, was not authorized to remand said cause to the District Court for the 124th Judicial District of the State of Texas, upon the allegations of [fol. 8] the motion to remand said cause for the reason that the jurisdiction of the said District Court of the United States for the Eastern District of Texas as a federal court and a federal jurisdiction has attached to said cause of action and that the jurisdiction of the Honorable District Court for the 124th Judicial District of Texas is terminated and extinguished and such cause must now be retained in the Honorable District Court of the United States for the Eastern District of Texas, under the provisions of Sections 29 and 38 (28 U. S. C. A. pars. 72 and 81) of the Judicial Code and should proceed therein as if said suit had been originally commenced in the said district court of the United States for the Eastern District of Texas, Tyler Division.

VIII

Your petitioner is advised that the said Honorable Randolph Bryant, Judge of the Honorable District Court of the United States for the Eastern District of Texas, in remanding said cause to the Honorable District Court for the 124th Judicial District of the State of Texas has transcended the jurisdiction of his said court and has undertaken the exercise of powers not vested in him or the said court by any laws of the United States.

Your petitioner, therefore, prays that a rule be made and issue from this Honorable Court requiring the said Honorable Randolph Bryant, United States District Judge for the Eastern District of Texas, and the said Honorable District [fol. 9] Court of the United States for the Eastern District of Texas, to show cause why a writ of mandamus should not be issued commanding the said Judge and the said court, and each of them, to vacate and set aside the order of said court hereinabove referred to remanding said cause to the District Court for the 124th Judicial District of Texas, and to show cause why a writ of Prohibition should not be issued prohibiting and enjoining the said Judge and the said Court and each of them, from remanding said cause to the District Court for the 124th Judicial District of Texas, or in the alternative for such other and further relief as to this honorable court may seem just and meet.

(Signed) R. H. Whilden, J. P. Adoue, Attorneys for Petitioner, Appearing Specially as Aforesaid.

Duly sworn to by J. P. Adoue. Jurat omitted in printing.

[fol. 10] EXHIBIT "A" TO PETITION

IN UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS, TYLER DIVISION

No. 3352. At Law

W. J. CLARK, Plaintiff,

vs.

EMPLOYERS REINSURANCE CORPORATION, Defendant

ORDER GRANTING MOTION TO REMAND

On this the 20th day of January, A. D. 1936, at a special term of this court, came on to be heard and considered the motion of the plaintiff W. J. Clark to remand this cause to the 124th Judicial District Court of Gregg County, Texas, and came the plaintiff by his attorneys and came the defendant by its attorneys and the court thereupon proceeded to hear said motion.

And the court, after hearing said motion and the arguments in support of and against same, is of the opinion that the same is well taken and should be granted.

It is therefore ordered, adjudged, and decreed by the Court that plaintiff's motion to remand this cause to the 124th Judicial District Court of Gregg County, Texas, be and the same is hereby granted, and the clerk of this court is ordered to transmit all of the original papers to the Honorable Dozier Skipper, Clerk of the 124th Judicial District Court of Gregg County, Texas, and this cause is hereby remanded to said 124th Judicial District Court of Gregg County, Texas, for further proceedings, upon payment of costs incurred in this court by the plaintiff.

(Signed) Randolph Bryant, Judge United States District Court.

[fol. 11] IN UNITED STATES DISTRICT COURT

No. 3352. At Law

[Title omitted]

OPPOSITION TO MOTION TO REMAND

Now comes Employers Reinsurance Corporation, defendant in the above entitled and numbered cause, appearing specially herein only for the purposes of this motion and not intending hereby in any manner to submit itself to the jurisdiction of this court, and files this its opposition to the motion filed herein by plaintiff to remand this cause to the State court from which the same was removed and says:

1

Defendant says that this cause was properly removed to this Honorable court, that a diversity of citizenship exists and that the amount in controversy in this cause is in excess of the sum of $3000.00, and that, therefore, this court has jurisdiction of the subject matter of this litigation, but that this court cannot proceed to judgment in this cause because it has not and cannot obtain jurisdiction over this defendant.

Wherefore, defendant says that the motion filed herein by the plaintiff to remand this cause to the State court should [fol. 12] be denied and that the defendant's plea to the jurisdiction of this court should be sustained and this cause dismissed from the docket of this court.

R. H. Whilden, J. P. Adoue, Attorneys for Defendant.

[fol. 13] IN UNITED STATES DISTRICT COURT

No. 3352. At Law

[Title omitted]

MOTION TO REMAND

To the Honorable Randolph Bryant, Judge of Said Court:

Now Comes the plaintiff, W. J. Clark, by his attorneys and moves the court to remand this cause to the 124th Judicial District Court of Gregg County, Texas, from whence it was removed and as grounds therefor says:

I

That the court has jurisdiction of the subject matter of this suit.

II

That the defendant, Employers Reinsurance Corporation, was served with process issued out of this court which process is ineffective for the reason that the same was served upon the agent of said corporation outside of the territorial limits of the United States District Court for the Eastern District of Texas and that said corporation has not voluntarily appeared and answered in this suit, that at the present time, the plaintiff does not know of any agent within the territorial limits of the United States District Court for the Eastern District of Texas and that under the foregoing facts the jurisdiction of this Honorable Court is doubtful.

[fol. 14] Wherefore, plaintiff prays that this Honorable Court remand this cause to the 124th Judicial Court of Gregg County, Texas, from whence it was removed.

E. W. Napier, Lasseter, Simpson and Spruiell, Attys. for Plaintiff, W. J. Clark.

Duly sworn to by Oran Lowry. Jurat omitted in printing.

[fol. 15] In United States District Court

No. 3352. At Law

[Title omitted]

Order Quashing Citations and Returns

On this 20th day of November A. D. 1935, at a regular term of court, came on to be heard the motions and pleas heretofore filed in the above entitled and numbered cause by the defendant, Employers Reinsurance Corporation, to quash the citations issued therein and the returns thereon, said motions and pleas having been regularly and duly put at issue in accordance with the rules of this court.

And the court having considered the pleadings and the exhibits and copies filed in connection therewith by defendant, and being fully advised in the premises, is of the opinion that said motions and pleas should be, and the same are in all things sustained, except insofar as they seek dismissal of this cause for want of jurisdiction.

It is, Therefore, Ordered, Adjudged and Decreed by the court that the citation heretofore issued in the above entitled and numbered cause, out of the District Court for the 124th Judicial District of Texas, Gregg County, Texas, and purporting to have been served upon one John R. Young an agent of Employers Reinsurance Corporation, and the citation heretofore issued in the above entitled and num-[fol. 16] bered cause out of this court and purporting to have been served upon one E. C. Gaines in the Western District of Texas, and the service thereof, and the returns thereon, be and the same are hereby quashed and declared illegal, void, and of no force or effect.

Randolph Bryant, Judge Presiding.

Approved as to form: E. W. Napier, Lasseter, Simpson & Spruiell, Attorneys for Plaintiff. J. P. Adoue, Attorney for Defts., Appearing Specially only.

[fol. 17] IN UNITED STATES DISTRICT COURT

No. 3352. At Law

[Title omitted]

MOTION TO QUASH, ETC.—Filed October 2, 1935

Appearing solely for the purpose of making this motion and not intending to submit himself to the jurisdiction of this court as a party hereto, nor to waive the plea to the jurisdiction of this court and motion to quash citation heretofore filed in this cause, comes now Employers Reinsurance Corporation, defendant above named, and files this, its plea to the jurisdiction of this honorable court, and motion to quash citation issued out of this honorable court upon plaintiff's petition, and the return thereon purporting to show service of such citation upon one E. C. Gaines, of Austin, in the Western District of Texas, and to dismiss the above entitled and numbered cause from the docket of this court and for cause, shows to the court as follows:

I

As will appear from the citation hereinabove referred to, issued in said cause, together with the purported return thereon, there has been no service made upon the said Employers Reinsurance Corporation, or any agent or employe thereof, within the Eastern District of Texas, wherein the said cause is now pending, the only attempted service in [fol. 18] said cause having been made upon E. C. Gaines at Austin, Texas, which lies within the Western District of Texas, and that such attempted or purported service is illegal, void and of no force and effect, and that this honorable court has obtained no jurisdiction over the defendant herein, and that therefore this cause should be dismissed.

II

That the plaintiff's petition filed herein does not set forth or disclose facts showing a cause of action within the juris-

diction of this court, in that it is not alleged that defendant is doing business within the Eastern District of Texas in such a manner as to subject itself to the jurisdiction of said honorable court and, therefore, this cause should be dismissed.

III

As will appear from the citation hereinabove referred to, issued in said cause, together with the purported return thereon, the defendant is not required thereby to appear and answer in said cause upon any date certain, nor is any return date set forth in said citation with that definiteness, certainty, and particularity in such cases made and provided by law, and that, therefore, said citation and the purported return made thereon, should be quashed.

IV

As will appear from the citation hereinabove referred to, issued in said cause, together with the purported return thereon, the same does not appear to be directed to or served upon any servant, agent, or employe of this defendant, Employers Reinsurance Corporation, in his or its representative capacity, but upon one E. C. Gaines, a resident and citizen of Austin, in the Western District of [fol. 19] Texas, in his individual capacity, and therefore said citation and the purported return thereon should be quashed.

Wherefore, Defendant prays the court that the citation above referred to and issued out of this honorable court in the above entitled and numbered cause, together with the return thereon should be quashed, and, that this cause be dismissed from the docket of this honorable court.

R. H. Whilden, J. P. Adoue, Attorneys for Defendant, Appearing Solely for the Purpose of Making the Above Motion, and Not Intending to Submit to the Jurisdiction of the Court.

Duly sworn to by J. P. Adoue. Jurat omitted in printing.

[File endorsement omitted.]

[fol. 20] IN UNITED STATES DISTRICT COURT,

No. 3352. At Law

[Title omitted]

MOTION TO QUASH, ETC.

Appearing solely for the purpose of making this motion, and not intending to submit itself to the jurisdiction of this court as a party hereto, comes now Employers Reinsurance Corporation, defendant above named, and files this, its plea to the jurisdi-tion of this honorable court, and motion to quash citation served upon the defendant herein, and to dismiss the above entitled and numbered cause from the docket of this court, and for cause shows to the court as follows:

I

As will appear from the citation issued in said cause, together with the purported return thereon, there has been no service made upon the said Employers Reinsurance Corporation, or any agent or employe thereof; the only attempted service in said cause having been made upon one John R. Young, of Houston, Texas. Your relator would show to the court, and here alleges, that said John R. Young is not now, nor has he been since November 1, 1933, an agent or employe of said Employers Reinsurance Corporation, and has not now, nor has he had since November 1, 1933, any connection or affiliation therewith; that said John R. Young is not now, nor was he at the time of the [fol. 21] service thereof, authorized to receive or accept service of citation in the name of or in behalf of said Employers Reinsurance Corporation, and your relator would further show to the court that one E. C. Gaines of Austin, Texas, was on November 1, 1933, made and appointed (and has continued as such to the present time) agent and attorney-in-fact for Employers Reinsurance Corporation, upon whom all process of law against said corporation in any action or legal proceedings might be served insofar as the same might be legally and validly done, and that upon said first day of November, 1933, all former authority or agency upon the part of the said John R. Young, to receive or accept service of citation for or on behalf of said Em-

ployers Reinsurance Corporation, was revoked and canceled.

Wherefore, your relator says that such attempted or purported service upon Employers Reinsurance Corporation is illegal, void, and of no force or effect, and that this honorable court has obtained no jurisdiction over the defendant herein, and prays that the citation issued in the above entitled cause should be quashed, and this cause dismissed from the docket of the court.

R. H. Whilden, J. P. Adoue, Attorney for Defendant appearing solely for the Purpose of Making the Above Motion, and not Intending to Submit to the Jurisdiction of the Court.

[fol. 22] *Duly sworn to by J. P. Adoue. Jurat omitted in printing.*

[fol. 23] IN UNITED STATES DISTRICT COURT, EASTERN DISTRICT OF TEXAS

CITATION AND MARSHAL'S RETURN

The President of the United States of America to the Marshal of the Western District of Texas, Greeting:

You are hereby commanded to summon E. C. Gaines, Austin, Texas, if to be found in your district, to be and appear before the Honorable District Court of the United States, at the next term thereof, to be holden for the Eastern District of Texas, at the Courthouse thereof in the City of Tyler, Texas, on Monday, the 7th day of October, 1935, to answer the petition of W. J. Clark, filed on the 24th day of July, 1935, Suit No. 3352, Law, against W. J. Clark, removed from the 124th District Court of Gregg County, Texas, in an action to set aside award made by the Industrial Accident Board, and for compensation as provided under the Employers Compensation Act of the State of Texas, of which you will serve the said defendant with the accompanying copy of said petition and also with a copy of this Writ.

Herein fail not, and due return of this Writ make.

Witness, the Honorable Randolph Bryant, Judge of said Court, and the seal thereof, at Tyler, Texas this the 7th day of Sept., in the year of Our Lord one thousand nine

hundred and thirty-five and of American Independence the 160th year.

Helen Mathews, Clerk, U. S. District Court, Eastern District of Texas, by Will H. Rayburn, Deputy. (Seal.)

Received this Writ on the 9th day of September, 1935, and executed the same on the 21st day of September, 1935, by delivering to the within-named defendant, E. C. Gaines, at Austin, Texas, in person a true copy of this Writ and a copy of the petition certified by the Clerk of this Court.

Guy McNamara, U. S. Marshal, by W. E. Riggs, Deputy.

Marshals Fees: $2.00.

[fol. 24] In United States District Court, Eastern District of Texas, Tyler Division

Clerk's Certificate

I, Helen Mathews, Clerk of the United States District Court in and for the Eastern District of Texas, do hereby certify that the annexed and foregoing is a true and full copy of the original order remanding case to state court, opposition of the defendant to the motion to remand and renewal of plea to the jurisdiction, Motion of plaintiff to remand the above case, order quashing citations in the case, plea to the jurisdiction and motion to quash citation issued out of the United States Court, plea to the jurisdiction and motion to quash citation issued out of the District Court for the 124th Judicial District of Texas, Gregg County, Texas, and citation for service on one E. C. Gaines, issued out of the U. S. District Court for the Eastern District of Texas, in the case of W. J. Clark vs. Employers Reinsurance Corporation, Law No. 3352, now remaining among the records of the said Court in my office.

I do further certify that no certificate has been sent to the Honorable District Court for the 124th Judicial District of Texas, Gregg County, Texas, certifying to it the order of remand in this case.

In testimony whereof, I have hereunto subscribed my name and affixed the seal of the aforesaid court at Tyler, Texas, this 6th day of February, A. D. 1936.

Helen Mathews, Clerk, by (Signed) Susie Kerr, Deputy. (Seal.)

[fol. 25] IN UNITED STATES CIRCUIT COURT OF APPEALS

[Title omitted]

ORDER TO SHOW CAUSE—February 10, 1936

It is ordered that Employers Reinsurance Corporation be permitted to file a petition for Writ of Mandamus and of Prohibition.

It is further ordered that the Honorable Randolph Bryant, United States District Judge for the Eastern District of Texas, do show cause on Thursday, February 20th, 1936, why Writs of Mandamus and Prohibition should not issue as prayed for.

[fol. 26] IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

[Title omitted]

ANSWER OF JUDGE RANDOLPH BRYANT, U. S. DISTRICT JUDGE, TO ORDER TO SHOW CAUSE—Filed February 14, 1936

To the Honorable United States Circuit Court of Appeals:

I

Now comes Randolph Bryant, respondent in the above entitled matter, and in answer to the Order to show cause herein, says that the allegations of fact contained in said petition present a substantially true account of the record and proceedings had in case No. 3352 upon the Law Docket of the United States District Court for the Eastern District of Texas, styled, W. J. Clark vs. Employers Reinsurance Corporation.

II

In entering the Order to remand, I thought that this was authorized under Section 80 of Title 28 of the United States Code Annotated, in that justice required this, as an Order of Dismissal would prevent the plaintiff from refiling his suit within the time permitted by the Statutes of Texas and would amount to a complete denial of his right to litigate his claim.

However, if in error in respect to this exercise of authority, I shall welcome correction by this Honorable Court and gladly abide by any order or direction thereof.

Respectfully submitted.

(Signed) Randolph Bryant, United States District Judge for the Eastern District of Texas.

[fol. 27] In United States Circuit Court of Appeals

[Title omitted]

Minute Entry of Submission of Petition for Mandamus and Prohibition—February 20, 1936

On this day the petition for writs of mandamus and prohibition in the above entitled and numbered matter was taken under submission by the Court.

[fol. 28] In United States Circuit Court of Appeals for the Fifth Circuit

No. 8040

In re Employers Reinsurance Corporation, Praying for a Writ of Mandamus and Writ of Prohibition

Before Foster, Sibley and Walker, Circuit Judges

Opinion of the Court—Filed March 11, 1936

Foster, Circuit Judge:

This is a petition for writs of mandamus and prohibition to compel the judge of the United States District Court for the Eastern District of Texas to vacate and order remanding a case to the District Court for the 124th judicial district of the state of Texas, from which it had been removed by petitioner. The material facts appearing from the record are these.

Suit was brought in the state court by W. J. Clark against Employers' Reinsurance Corporation, to set aside an award of the Industrial Accident Commission of Texas and

service of process was made upon a former agent of defendant not then authorized to receive service. The suit was removed to the Federal Court and thereafter defendant appeared specially and moved to quash the service. The motion was sustained. The insurance company was doing business in Texas and had an authorized agent for service [fol. 29] residing in Austin. Process then issued out of the Federal Court and was served upon the authorized agent. Defendant again appeared specially and moved to quash this second service, on the ground that process of the court could not run out of the district and the city of Austin was not within the territorial jurisdiction of the court. This motion was also sustained. Plaintiff then moved that the case be remanded to the state court. Over objection of defendant, for the third time appearing specially, this motion was granted.

In answer to a rule to show cause the District Court stated that he thought he was authorized to enter the order to remand the case under the provisions of Sec. 80 Title 28 USCA in order to do justice as an order of dismissal would prevent plaintiff from refiling his suit within the time permitted by the statute of Texas and would amount to a complete denial of his right to litigate the claim.

The pertinent provisons of the statute dealing with the remanding of a case after removal are these:

Section 71, Title 28 U. S. C. A. "Whenever any cause shall be removed from any State court into any district court of the United States, and the district court shall decide that the cause was improperly removed, and order the same to be remanded to the State court from whence it came, such remand shall be immediately carried into execution, and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed."

Section 80, Title 28 U. S. C. A. "If in any suit commenced in a district court, or removed from a State court to a district court of the United States, it shall appear to the satisfaction of the said district court, at any time after [fol. 30] such suit has been brought or removed thereto, that such suit does not really and substantially involve a dispute or controversy properly within the jurisdiction of said district court, or that the parties to said suit have been

improperly or collusively made or joined, either as plaintiffs or defendants, for the purpose of creating a case cognizable or removable under this chapter, the said district court shall proceed no further therein, but shall dismiss the suit or remand it to the court from which it was removed, as justice may require, and shall make such order as to costs as shall be just."

These sections of the code are taken from the Judiciary Act of March 3, 1887, as amended. Prior to the enactment of that legislation it was settled that mandamus was an appropriate remedy to control the action of the lower court in remanding a case. Thereafter the Supreme Court ruled that the addition of the words "such remand shall be immediately carried into execution and no appeal or writ of error from the decision of the district court so remanding such cause shall be allowed" had the effect of taking away the remedy by mandamus. Ex parte Matthew Addy S. S. Co., 256 U. S. 417, and authorities cited therein.

While the provisions of section 71, construed by the Supreme Court as prohibiting mandamus, do not appear in section 80, the sections are in *pari materia* and it is extremely doubtful that a writ of mandamus may issue to control the action of the District Judge in remanding a case under the provisions of the latter section. However, we do not consider it necessary to decide that question. There is no doubt that the suit was properly removed into the District Court for the Eastern District of Texas. The quashing of service did not require a dismissal as the court had general jurisdiction of the case. Conceding that process [fol. 31] of the court could not run out of the district, with the quashing of the second service the court was without power to enter judgment. Upon remand, the state court, under the law of Texas, would have authority to make service anywhere in the state and jurisdiction to decide the issues. If the suit were not remanded plaintiff would never be able to enforce his demand, no matter how just, without the voluntary appearance of defendant. The actions of defendant so far indicate no intention of ever voluntarily appearing. The Federal Courts may not be used to perpetrate an injustice. Furthermore, having prevailed in its motions to quash the services, defendant was no longer before the court and was without standing to object to the

remanding of the case. We consider the discretion of the District Court was properly exercised in remanding the case.

The petition is denied.

[fol. 32] IN UNITED STATES CIRCUIT COURT OF APPEALS

No. 8040

In re EMPLOYERS REINSURANCE CORPORATION, Praying for a Writ of Mandamus and Writ of Prohibition

JUDGMENT—March 11, 1936

This cause came on to be heard on the petition of Employers Reinsurance Corporation, praying for a writ of mandamus and writ of prohibition, directed to the Judge of the United States District Court for the Eastern District of Texas, and was taken under submission by the Court upon said petition, answer of respondent thereto and briefs on file;

On consideration whereof, It is now here ordered, adjudged and decreed by this Court, that said petition be, and the same is hereby, denied.

[fol. 33] IN UNITED STATES CIRCUIT COURT OF APPEALS, FIFTH CIRCUIT

PETITION FOR REHEARING—Filed March 30, 1936

To the Honorable Justices of the Circuit Court of Appeals for the Fifth Circuit of the United States:

Now comes Employers Reinsurance Corporation, petitioner herein, and presents this, its petition for a rehearing of the above entitled cause and, in support thereof, respectfully shows:

I

That the holding of this Honorable Court that the action of the court below in remanding the cause to the District

Court for the 124th Judicial District of the State of Texas was an exercise of judicial discretion is contrary to the law generally and in particular as heretofore announced by this Honorable Court, it being the contention of petitioner herein that such action of the court below requiring decision only of a question of law was not an action involving the exercise of judicial discretion, but was an act without the jurisdiction of the court below and therefore coram non judice.

[fol. 34]

II

That the holding of the Court that writ of mandamus or prohibition will not issue to control the action of the Honorable Randolph Bryant, Judge of the District Court of the United States for the Eastern District of Texas, in remanding a case under Section 80 of 28 U. S. C. A. where it is admitted that the case was properly removed to the Federal Court and that the court had jurisdiction of the subject matter of the litigation, is contrary to the law.

III

That the holding implied in the opinion of this Honorable Court that because of hardship alone the legal jurisdiction of a district court of the United States may be done away with by the court itself is contrary to the law.

Wherefore, upon the foregoing grounds, it is respectfully urged that this petition for rehearing be granted and that the decree of the Honorable United States Circuit Court of Appeals for the Fifth Circuit of the United States be upon further consideration reversed.

Respectfully submitted, (Signed) R. H. Whilden, J. P. Adoue, Counsel for Petitioner.

I, counsel for the above named Employers Reinsurance Corporation, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

(Signed) J. P. Adoue, Counsel for Petitioner, Employers Reinsurance Corporation.

[fol. 35] In United States Circuit Court of Appeals

[Title omitted]

Order Denying Rehearing—April 3, 1936

It is ordered by the Court that the petition for rehearing filed in this cause be, and the same is hereby, denied.

[fol. 36] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 37] Supreme Court of the United States

Order Allowing Certiorari—Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Fifth Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.